BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Continue Implementation and Administration, and Consider Further Development of, California Renewables Portfolio Standard Program.	)	Rulemaking 15-02-020 (Filed February 26, 2015)

CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION REPLY COMMENTS ON ADMINISTRATIVE LAW JUDGE'S RULING REQUESTING COMMENT ON IMPLEMENTATION OF ELEMENTS OF SENATE BILL 350 RELATING TO PROCUREMENT UNDER THE CALIFORNIA RENEWABLES PORTFOLIO STANDARD

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In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission") and the *Administrative Law Judge's Ruling Requesting Comment on Implementation of Elements of Senate Bill 350 Relating to Procurement under the California Renewables Portfolio Standard* ("ALJ Ruling"), filed April 15, 2016, the California Municipal Utilities Association ("CMUA") respectfully submits these reply comments on behalf of its members.

I. GENERAL REPLY

In general, it appears that the great majority of parties provided consistent responses to the questions posed in the ALJ Ruling. This is due in large part to the fact that Senate Bill ("SB") 350 primarily just extended the current renewables portfolio standard ("RPS") program rather than replacing it. A broad spectrum of parties support this interpretation of SB 350. For example, the comments filed jointly by The Utility Reform Network ("TURN") and the Coalition of California Utility Employees ("CUE") stated:

> the Legislature largely left intact the structure of the current program. Indeed, with very few exceptions, SB 350 continues the current RPS structure, added 3 new compliance periods with steadily increasing compliance obligations and made a few other key conforming changes.[1]

Similarly, San Diego Gas and Electric ("SDG&E") noted:

> SB350 does not replace the current RPS program, but rather works within the existing framework to continue the current program (necessarily addressing years subsequent to 2020). The Commission should ensure that the regulations developed as part of this implementation process reflect this reality and maintain consistency with the current program where appropriate.[2]

As the Commission implements SB 350, it must keep the narrow scope of these changes in mind. In particular, this means that the Commission should ensure that existing investments by retail sellers should be given their full expected value unless the Legislature has clearly expressed a counter intent.

II. STIPULATION REGARDING RPS BANKING AMENDMENT

Pacific Gas & Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and SDG&E jointly developed and support the "Stipulation Regarding RPS Banking Amendment." Additionally, TURN and CUE indicated support for the Stipulation.[3] The Stipulation seeks to describe how the new excess procurement rules should be implemented by the Commission and includes three examples.

CMUA generally supports the Stipulation, based on the understanding that it continues the existing excess procurement rules with two changes: (1) there is no longer a contract duration requirement; and (2) portfolio content category ("PCC") 2 renewable energy credits ("RECs") will continue to count in the excess procurement calculation but may no longer be banked as excess procurement.

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[1] TURN and CUE Comments at 1.
[2] SDG&E Comments at 2.
[3] TURN and CUE Comments at 5.

III. REPLIES TO PARTY COMMENTS ON THE ALJ RULING

A. Question 8

1. The long term procurement requirement does not only apply to new contracts and utility owned generation.

The Commission should not restrict compliance with Public Utilities Code Section 399.13(b)[4] to only post-January 1, 2021 contracts or ownership agreements. In its opening comments, Noble Americas Energy Solutions ("Noble") asserts that the Commission should interpret Section 399.13(b) such that "only those long-term contracts or ownership agreements with initial deliveries starting on or after January 1, 2021, and utility-owned generation entering into commercial operation on or after January 1, 2021, will count toward a load-serving entity's compliance with the 65-percent standard."[5]

CMUA strongly disagrees with Noble's interpretation of Section 399.13(b), which is contrary to the position taken by the vast majority of the commenting parties. As CMUA stated in its opening comments, such an interpretation conflicts with the clear statutory language and would lead to results inconsistent with the intent and purpose of this new requirement. For example, a retail seller with a portfolio that is almost entirely made up of long term procurement could be out of compliance with this requirement if its post-January 1, 2021 procurement did not meet the 65 percent requirement. In this scenario, the retail seller would be penalized for its prospective investments in long term contracts and the retail seller's ratepayers will still be paying for the existing resources. Further, such an interpretation would create an incentive for parties to either terminate or not extend contracts executed prior to January 1, 2021. It would

[4] Unless otherwise noted, all code sections are to the California Public Utilities Code.
[5] Noble Comments at 2-3.

also incentivize retail sellers to delay new long term commitments for another five years in order to ensure that the resources would be eligible to meet this requirement.

CMUA does acknowledge that the new long term procurement requirement is a dramatic change from the prior requirements and will impact some entities more than others. In particular, this requirement will be the most challenging for smaller retail sellers and those retail sellers with procurement models that differ from the large investor owned utilities. The need to address these challenges provides greater support for building more flexibility into the regulation. However, this flexibility must be consistent with the language of Section 399.13(b) and the RPS program in general, such as the recommendations offered by CMUA in its opening comments.

2. The Commission should provide additional clarifications to Section 399.13(b).

The opening comments filed by Shell Energy North America, L.P. ("Shell") and Commerce Energy, Inc. ("Commerce") recommend the following two interpretations of Section 399.13(b):

> The Commission also should confirm that an LSE has flexibility to count the RECs generated under its long-term contracts (as well as under RPS facility ownership and/or ownership agreements) for RPS compliance in the compliance period in which delivery of the RECs under the agreement occurs, regardless of when the agreement was executed. For example, as long as some portion of the contract quantity is delivered during a year of the compliance period, the delivery under the long-term contract or ownership agreement should count toward the 65 percent "procurement" requirement.
>
> Finally, the Commission should confirm that: a) 10-year (i.e. long-term) contracts; b) "ownership" of an RPS-eligible facility; and c) an "ownership agreement" for RPS-eligible resources, are three distinct means by which an LSE may meet its 65 percent procurement obligation under P.U. Code Section 399.13(b). "Ownership" of an RPS-eligible facility, and/or an "ownership agreement" for all or a portion of an RPS-eligible facility, do not necessarily

> require a "long-term" (i.e. 10-year) commitment. An "ownership agreement" is distinct from, and an alternative to, a 10-year contractual commitment.[6]

CMUA supports these proposals as providing the type of additional flexibility and clarity necessary to implement the new long term procurement requirements without putting an undue burden on retail customers.

B. Question 15

The Commission should not unduly restrict a retail seller's use of the excess procurement provisions by imposing filters or other requirements not mandated by SB 350. In its comments, PG&E provides the following response to Question 15:

> the rules for excess procurement should continue to apply to all RECs retired for RPS compliance in a given compliance period, regardless of whether those RECs comply with the separate minimum long-term requirement. However, the RECs retired and counted for compliance in a given compliance period must continue to satisfy all RPS procurement and compliance requirements. **The 65% minimum long-term requirement should be applied as a filter**, consistent with how the PBR was implemented in D.14-12-023,15 before RECs can be used to meet the PQR.[7]

CMUA strongly disagrees with PG&E's proposal to treat the long term procurement requirement as a filter that is applied to a retail seller's procurement ***before*** the excess procurement calculation is run. Such an interpretation would unnecessarily restrict the ability of retail sellers and their customers to benefit from this provision. Additionally, PG&E's proposal would perpetuate one of the biggest problems with the old excess procurement rules, the risk of the complete loss of value associated with retired PCC1 RECs due to the contract term.

The plain language of Section 399.13(b) does not support PG&E's proposal:

> Beginning January 1, 2021, at least 65 percent of the procurement a retail seller **counts toward the renewables portfolio standard requirement** of each

[6] Shell Comments at 4.
[7] PG&E Comments at 10 (emphasis added).

> compliance period shall be from its contracts of 10 years or more in duration or in its ownership or ownership agreements for eligible renewable energy resources.[8]

The Commission should interpret the phrase "counts toward the [RPS] requirement of each compliance period" to have its obvious meaning, which is the actual RECs that are being used for compliance. This would include: (1) the RECs remaining after any excess RECs are banked; plus (2) any excess procurement from a prior compliance period being applied in the current compliance period.

PG&E's proposal would also be inconsistent with Section 399.13(a)(4)(B)(i), which states: "For electricity products meeting the portfolio content requirements of paragraph (1) of subdivision (b) of Section 399.16, **contracts of any duration may count as excess procurement**."[9] Under PG&E's proposal, RECs would be disqualified from counting as excess procurement purely because of duration of the associated contract.

Finally, PG&E's proposal appears to be inconsistent with the "Stipulation Regarding RPS Banking Amendment," which provides:

> each REC that is eligible for banking under these rules will retain its long-term or short-term attribute for purposes of implementing the separate long-term contracting requirement in any future RPS compliance period in which that banked REC is used for compliance."[10]

Why would a banked REC retain its long-term or short term attribute if it has already been used for compliance with the long term procurement requirement? PG&E's proposal would presumably require that each REC be counted twice for purposes of meeting the long term procurement requirement, once when initially applied to a compliance period, and again, when

[8] Cal. Pub. Util. Code § 399.13(b) (emphasis added).
[9] Cal. Pub. Util. Code § 399.13(a)(4)(B)(i) (emphasis added).
[10] Stipulation at 1.

the REC is pulled out of the excess procurement bank and actually counted for compliance. Such an interpretation is not consistent with the plain language or intent of SB 350.

C. Question 21

SB 350 did not amend the provisions regarding the treatment of RECs that have already been qualified as excess procurement. The Comments jointly submitted by TURN and CUE respond to Question 21 as follows:

> No. The new banking rules do not permit grandfathering of any banked volumes that were sourced from PCC 2 transactions. Banked RECs retain their PCC classification and are therefore subject to the requirements in §399.13(a)(4)(B). Had the Legislature intended to grandfather prior banked volumes, this intent would have been explicit in SB 350.

CMUA disagrees with this interpretation. The rules of statutory construction provide that statutes are presumed to apply prospectively, unless the clear language of the statute states that it applies retroactively. Specifically, the rules of statutory construction provide:

> "A retrospective law . . . is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute."[11]

And further:

> "It is a widely recognized legal principle, specifically embodied in section 3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively."[12]

In this case, eliminating the value of already banked PCC2 RECs would be a retroactive application to actions that were performed prior to the adoption of SB 350. Pursuant to the rules of statutory construction, the Legislature would have needed to make this intent explicit. The TURN and CUE comments seem to assume the opposite, arguing that the Legislature would have included specific grandfathering language if it did not want to have retroactive application.

[11] *Ware v. Heller*, 63 Cal. App. 2d 817, 822 (1944) (citing *American States W. S. Co. v. Johnson*, 31 Cal. App. 2d 606, 613 (1939)).
[12] *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1193-1194 (1988).

The question in the ALJ's Ruling does not address "grandfathering" of PCC2 ***contracts***, but instead, PCC2 ***RECs*** that have already been retired and banked consistent with the rules in place at the time. The Commission should not apply the new excess procurement rules to RECs that have already been banked.

D. Question 25

Retail sellers that express an intent to meet the long term procurement requirements prior to 2021 should not be subject to fines or penalties for failing to meet the long term procurement requirement early. The Comments jointly submitted by TURN and CUE respond to Question 25 as follows:

> This would be a violation. A retail seller cannot take advantage of the option to bank short-term PCC 1 RECs in Compliance Period 3 unless that retail seller also accepts the obligation to comply with Section 399.13(b). This is the explicit quid pro quo contained in Section 399.13(a)(4)(B)(iii).[13]

Similarly, Shell responds:

> If an LSE elects to comply with the Section 399.13(b) requirement during the compliance period 2017-2020, but the LSE fails to achieve 65 percent of its RPS compliance with RECs from eligible contracts, the LSE should be treated as out of compliance with the requirements of Section 399.13(b).[14]

CMUA disagrees with this interpretation. During the third compliance period, the long term procurement requirement is a voluntary option, and as such, should not have any "compliance" obligation associated with it. Imposing penalties for a failure to comply with a voluntary election would likely act as a significant deterrent to the use of this provision. The third compliance period spans four years, and during this time, unexpected circumstances, such as project delay or changes in retail load, could risk a retail seller's ability to comply. Instead, if

[13] TURN and CUE Comments at 6.
[14] Shell Comments at 9.

a retail seller that has indicated its intent to use Section 399.13(a)(4)(B)(iii) fails to meet the requirement, they should simply be unable to utilize the new excess procurement rules.

Further, Section 399.13(a)(4)(B)(iii) does not expressly state that a failure to meet the requirements of Section 399.13(b), after a retail seller has provided notice, is subject to penalties. The Commission must exercise extreme caution when imposing new financial penalties for retail sellers. The Commission's adopted penalties for the procurement quantity requirements ("PQR") and the portfolio balance requirements ("PBR") are already several times higher than the cost of actual compliance. However, unlike PBR and PQR violations, where the retail seller did not procure enough, a retail seller violating only the long term procurement requirements will have actually procured the correct amount of renewable generation and will likely have paid a price similar to the cost of long term procurement. Any penalties for a failure to meet the long term procurement requirement will need to acknowledge that the retail seller has already incurred the costs of compliance. These complications require careful consideration by the Commission, but are not necessary for the Commission to implement Section 399.13(a)(4)(B)(iii).

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IV. CONCLUSION

CMUA appreciates the opportunity to provide these reply comments to the Commission.

May 16, 2016,

Respectfully submitted,

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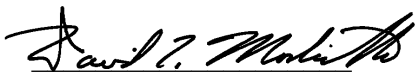
VERIFICATION

I am an officer of the California Municipal Utilities Association, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 16, 2016 at Sacramento, California.



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